TAN SIEW ENG

v.

CONNIE ENG SIONG KHENG

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C618 OF 1980]
15 APRIL 1988

CIVIL PROCEDURE: *Pleadings - Statement of claim - Striking out under O. 18 r. 19 - RHC inherent jurisdiction of the Court - Judgment under O. 27 r. 3 - RHC whether claim time barred.*

In this action the plaintiff is the mother of the defendant. The plaintiff has between 23 April 1974 and 25 July 1975 transferred to the defendant, 526,316 shares in 77 companies incorporated in Malaysia and Singapore. The plaintiff had retained at all times the possession and control of the shares. On 26 May 1980 plaintiff's solicitors wrote to the defendant requesting her to retransfer 418231 out of 526316 shares in 69 out of 77 companies to the plaintiff or alternatively to pay for the said shares which the defendant refused to do.

Held:
The statement of claim raises issues of fact and law which should be decided at the trial.

[Application dismissed with costs.]

Cases referred to:
Reeves v. Butcher [1981] 2 QB 509
Hemp v. Garland [1843] QB 518
Nadefinco Ltd. v. Kevin Corporation Sdn. Bhd. [1978] 2 MLJ 59
Workman, Clark & Co. Ltd v. Lloyd Brazileno [1908] 1KB 968
Lakshmijit s/o Bhaiu Suchit v. Faiz Mohammed Khan Sherani [1974] AC 605

Legislation referred to:
Civil Law Act 1956, s. 11
Limitation Act 1953, s. 6(1)(a)
Rules of the High Court 1980, O. 18 r. 19, O. 27 r. 3

Other source referred to:
Halsbury's Law of England, 4th Edn., Vol. 28 p. 299

For the applicant/defendant - Jagjit Singh
For the plaintiff/respondent - Wong Chong Wah

JUDGMENT

Zakaria Yatim J:

This is an application by the defendant for an order of the Court that the plaintiff's writ of summons and statement of claim be struck out under O. 18 r. 19 of the Rules of the High Court 1980 and under the inherent jurisdiction of the Court on the ground that the statement of claim discloses no reasonable cause of action; or it is frivolous and vexatious; or it is otherwise an abuse of the process of the Court. The defendant also asks that the plaintiff's action against her be dismissed and that the defendant be at liberty to enter judgment of her costs including costs of this application. In the same application, the defendant also asks the following alternative prayers:

(1) that the defendant be at liberty to sign final judgment against the plaintiff for an order that the plaintiffs do deliver up to the defendant the stock/share certificates and the deeds particulars whereof are contained in Exhibit ESK2 to the defendant's affidavit in support of the application and in para. 4 of the same affidavit.

(2) that judgment be entered against the plaintiff under O. 27 r. 3 of the Rules of the High Court, 1980 for an order that the plaintiff do deliver up to the defendant the said stock/ shares certificates and the title deeds aforesaid; and

(3) that the plaintiffs do pay damages to the defendant for the wrongful detention of the aforesaid documents and costs of this action.

When I first heard the application in Chambers on 23 January 1985, the parties informed me that they had reached agreement on certain issues and I accordingly recorded the following consent order:

(a) all the stock and share certificates, full particulars of which are in Exhibit ESK2 of encl. 31 (the affidavit in support of the application) to the delivered to the applicant/ defendant.

(b) the title deeds of the four proper ties, full particulars of which are in para. 11(b) of the counterclaim to be delivered to the applicant/defendant.

(c) The prayer for damages in the application to be argued on a date to be fixed.

(d) The said stock and share certificates and the said title deeds to be delivered to the applicant/defendant or her solicitors within one month from the date of the consent order.

After the consent order was made, the remaining issues to be considered by the Court are (1) the defendant's application to strike out the plaintiff's writ. (2) the defendant's application that judgment be entered against the plaintiff under O. 27 r. 3 of the Rules of the High Court.

In her statement of claim, the plaintiff avers as follows: The plaintiff is the mother of the defendant. Between 23 April 1974 and 25 July 1975 the plaintiff transferred to the defendant 526316 shares in 77 companies incorporated in Malaysia and Singapore. The shares transferred to the defendant were to be held by the defendant as trustee for the plaintiff and it was not intended that the beneficial interest in the shares should pass to the defendant. No consideration was paid by the defendant and the shares were not a give to the defendant. Pursuant to the trust, the defendant executed and delivered to the plaintiff blank transfers of some of the shares and she was required to execute and deliver further transfers whenever called upon to do so by the plaintiff. The plaintiff retained in her possession all share certificates relating to the shares and continued to retain them and thereby retained possession and control of the shares. In order to avoid any suggestion that the shares had been gifted to the defendant the shares were expressed to be sold by the plaintiff to the defendant although no purchase price was paid. Alternatively, if the shares were not transferred to the defendant as trustee, they were sold to the defendant, who had not paid the agreed purchase price or any part thereof in consequence whereof the plaintiff was entitled to revoke the sale and to have the shares retransferred to her by reason of failure of consideration. Alternatively, the plaintiff is entitled to exercise an unpaid vendor's lien over the shares and to sell the shares for the purpose of recovering the sale price thereof. On 26 May 1980, the plaintiff's solicitors wrote to the defendant requesting her to retransfer 418321 out of 526316 shares in 69 out of 77 companies to the plaintiff or alternatively to pay for the said shares, which the defendant had refused to do. The number of shares was restricted to

418,231 for reason of limitation. On 5 June 1981, the defendant wrote to the secretaries of several companies namely, Gim Aik Sdn. Bhd., Bukit Katil Rubber Estates Bhd. instructing them not to transfer shares in their companies without her consent. The defendant had also written similar letters to the other companies concerned.

The plaintiff's claim, therefore, is for money payable by the defendant for the price of 418,231 shares in 69 companies, and in the alternative for an order that the defendant, at her own cost re transfer the said shares to the plaintiff. The plaintiffs also asks for a declaration that she is entitled to an unpaid vendor's lien for the purchase of price of the said shares; and for an order that the plaintiff be at liberty to sell the said shares and in default of the defendant executing the necessary transfers, the Registrar be empowered to execute the same in the name and for and on behalf of the defendant. The plaintiff also claims interest under s. 11 of the Civil Law Act on the purchase price from the respective dates of sale to date of judgment. Alternatively, the plaintiffs asks for a declaration that the defendant holds 526316 shares in 77 companies in trust for the plaintiff absolutely and an order that the defendant do transfer the same to the plaintiff at her expense. Finally, the plaintiff also claims damages and costs from the defendant. The defendant in her affidavit in support of the application referred to the Exhibit EKS1 and averred that she was never a party to the said document. Counsel for the defendant, Mr. Jagjit Singh submitted that EKS1 was just a letter written by the plaintiff and it was not a sale agreement to which the defendant was a party. The document ESK1, dated 20 September 1974 and it reads as follows:

> To whom it may concern.
>
> This is to certify that I have sold the shares as specified in the attached Scheduled at Appendix 'A1' to my daughter Ee Siong Heng for the sum of RM1,143,158.87.
>
> As she is not in a position to pay me this amount in one payment I have agreed to her offer of paying me by monthly installments of RM2,000 only with effect from month of April 1974 until the whole amount has been paid.
>
> Sgd/-
> (Tan Siew Eng)
>
> Witness: Sgd./-
> Mastsy Cheong
> 20 September 1974.

Counsel for the plaintiff, Mr. Wong Chong Wah, however contended that the plaintiffs was not relying solely on ESK1. He said the statement of claim made no reference to ESK1. According to him the plaintiff set out the facts in the statement of claim that the shares were held on trust by the defendant for the plaintiff. Mr. Wong submitted that there were two causes of action in the statement of claim namely trust and breach of contract. He said that a lot of evidence is to be adduced on the issue of trust and contract. After considering the affidavits and the submissions of Counsel, I find that there are issues to be tried both on facts and on law.

The next ground relied upon by the defendant in support of her application is that the plaintiff's claim was time barred. In her affidavit the defendant averred that the action accrued against her was in April 1974 but the writ of summons was filed against her on 3 June 1980. According to her the action was brought against her after the expiration of six years from the date on which the cause of action occurred and was therefore barred by s. 6(1)(a) of the Limitation Act 1953. The basis of the defendant argument is document ESK1. Mr. Jagjit Singh said on this ground, the entire writ and statement of claim should be struck off. In support

of his argument he cited *Reeves v. Butcher* [1891] 2 QB 509 @ 511; *Hemp v. Garland* [1843] QB 518 @ 996 and *Nadefinco Ltd. v. Kevin Corporation Sdn. Bhd.* [1978] 2 MLJ 59. In these cases the agreements concluded between the parties contained default clauses and the limitation period ran from the first default. See *Halsbury's Laws of England*, 4th Edn., Vol. 28, p. 299.

In the present case, however, the document, ESK1 does not contain any default clause and *Revees v. Butcher supra; Hemp v. Garland, supra., and Nadefinco Ltd. v. Kevin Corporation Sdn. Bhd. supra.*, cannot be relied upon. In the absence of default clause in ESK1, each failure to pay an instalment gives rise to a cause of action. When the defendant failed to pay an instalment the plaintiff could elect to repudiate the contract and sue the defendant for damages or the plaintiff could treat the contract as still alive and sue the defendant for a particular breach. See *Workman, Clark & Co. Ltd. v. Lloyd Brazileno* [1908] 1 KB 968 @ 977; and *Lakshmijit s/o Bhai Suchit v. Faiz Mohammed Khan Sherani* [1974] AC 605 @ 616. Where there is repudiation of the contract, time beings to run after election has been exercised. In the present case the plaintiff did not elect to repudiate the contract but chose to keep it alive and sued the defendant on the breach. In the circumstances the plaintiff is not barred by the Limitation Act 1953. I should add here that with regard to breach of trust, there is no time bar.

In para. 4 of the amended statement of defence and counter-claim the defendant denies that ESK1 was an agreement. If there is no agreement at all then the questions of time bar does not arise.

For the reasons stated above, I find that the statement of claim raises issues of facts and law which should be decided at the trial. I therefore dismiss the application with cost.

Also found at [1988] 2 CLJ 855